White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation

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I. Introduction

On June 14, 2012, two African-American males filed a putative class action against ABC, the television network that broadcasts The Bachelor and The Bachelorette. As one legal blog quipped, the reality television shows have been “spawning more litigation than marriages.” The plaintiffs alleged that ABC deliberately excluded people of color from the lead role on the shows. Over the shows’ ten-year history since 2002, they had not featured a single person of color in the lead role, and a few people of color who participated on the shows as suitors were eliminated early. ABC and its co-defendants were sought to dismiss the suit on the basis that the First Amendment of the United States Constitution protected their casting decisions.

In October 2012, the court granted the defendants’ motion to dismiss. Although no court had ever applied the First Amendment to protect casting decisions, the court concluded that casting decisions warranted First Amendment protection because such decisions are “part and parcel of the creative process behind a television program.” In April 2013, the court denied the plaintiffs’ request to file their second amended complaint, which sought to include employment discrimination claims under Title VII of the Civil Rights Act of 1964 (“Title VII”). The court reasoned that the plaintiffs had been well aware of the basic facts supporting their Title VII claims before they initiated the lawsuit, but held those claims “in their back

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3. Claybrooks Complaint, supra note 1, at 2–3, 8–9.
4. Carton, supra note 2. In 2003, ABC began airing “The Bachelorette as a spin-off of The Bachelor.” Claybrooks v. ABC, 898 F. Supp. 986, 989 (M.D. Tenn. 2012). These shows are “essentially identical,” with one difference that “the gender roles are reversed—a woman occupies the lead role and approximately 25 men compete to be the winner.” Id. By the time the court decided Claybrooks in October 2012, ABC had aired a total of twenty-four combined seasons of The Bachelor and The Bachelorette, and had only featured white Bachelors and Bachelorettes. Id. and n.4. According to a news article, the defendants had cast almost exclusively white participants because they had feared that “potential controversy stemming from interracial romance . . . would alienate the Shows’ predominantly white viewership.” Id.
5. Carton, supra note 2.
7. Id. at 993. “The First Amendment protects a variety of artistic forms of expression, including entertainment, television programs, and dramatic works.” Id. (citation omitted).
pocket until the court decided the Motion to Dismiss." 9 Plaintiffs have not appealed the decision of the district court. Consequently, whether they could have successfully litigated their Title VII claims remains an open question. 10

This note evaluates the circumstances under which the law should protect non-actors applying for reality television as "applicants for employment" within the meaning of federal and state employment discrimination laws. This note will argue that the casting process is the functional equivalent of a job screening process; thus, reality television applicants should receive the same legal protections as any other job applicants. 12 The note will also argue that the law should not allow the free speech rights to diminish employment rights and civil rights when the speech in question encourages unlawful discrimination. Part II of this note will provide the background of reality television and discriminatory casting in the entertainment industry, and explain the current legal landscape in this area. Part III will explore potential claims that a plaintiff can bring under the federal and state antidiscrimination laws, their viability, and potential challenges that the plaintiff will face in the course of litigation. Part IV will propose alternative solutions to minimize discriminatory casting decisions in reality television, arguing that network producers will likely face a flurry of discrimination lawsuits in the near future. Part V will conclude by recommending that litigants should explore employment discrimination claims and other available legal remedies to settle the law concerning discriminatory casting.

II. Background

A. Reality Television

Reality television has become extremely popular only in the last few decades, 13 but its origins date back over sixty years ago with programs like Candid Camera in 1948, Truth or Consequences and What's My Line in

9. Id. at *5.
12. This note, however, will only focus on federal and state antidiscrimination laws, and not other types of employment laws, such as wage and hour laws.
1950, and I've Got a Secret in 1952. The reality programs we know today gained popularity when writer strikes in the late 1980s left producers to rely instead on unscripted reality shows featuring ordinary people. Unscripted reality shows seek ordinary people to join the famous circle usually enjoyed only by celebrities. As such, unscripted reality shows are different from scripted shows featuring famous actors with significant celebrity status, also known as "celebreality." 

Television producers prefer unscripted reality shows because of their relatively low budgets and guaranteed success from real life drama that resonates with viewers. Unscripted reality shows typically require "less-talented actors or ordinary people," so their production costs tend to be lower. Production companies save a large amount of money "because of the cheap cost of labor that comes with hiring 'participants,' rather than actors with significant celebrity status." As reality television programs gain more and more popularity, legal scholars anticipate that more problems will arise from exploiting the benefits of reality television. Although discriminatory casting could cause many legal and social issues, this note will only examine it through the perspective of equal rights under the law.

B. Casting Processes

The underrepresentation of minorities in television, especially in lead roles, has been an industry-wide problem since the television was invented


15. See Hopkins, supra note 13, at 2 (detailing the history of reality television).

16. See Slocum, supra note 14 (explaining that talent search programs allowed the three American Idol stars, Kelly Clarkson, Ruben Studdard, and Fantasia to join Britney Spears and Justin Timberlake from Star Search).


18. See Slocum, supra note 14 ("In virtually every line of the production budget, reality-based programming is cheaper than traditional programming.").

19. See id. ("[R]eality TV has one appeal, which it shares with fiction—we as viewers hope, desperately, to find something relevant to our own lives... The possibility that reality-based stories will reveal something real is so enticing that the televised society is just fine with us.").


22. Id. ("As more reality shows are produced, litigation involving such programs is on the rise."); cf. Hopkins, supra note 13, at 5–7 (discussing certain risks present in reality shows).
in the 1920s. Historically, movie and television casting directors have a very small role in decision-making, and a very small number of them actually try to diversify the casting pool. Any person in the decision-making chain, including studio executives, producers, directors, and casting directors, can deny an applicant because of race or sex-based considerations. Moreover, in the entertainment industry, the default racial designation is white unless an exceptional situation calls for a non-white actor.

For traditional television programs, "[m]ost casting directors rely on a company called Breakdown Services to parse a script into descriptions of the characters and transmit these 'breakdowns' to talent agents." The vast majority of breakdowns specify race classifications for the roles, but this information is concealed from the actors because breakdowns are released only to talent agents. Thus, any discrimination involved in the casting process is generally unknown to the public and concealed from excluded applicants. Moreover, finding direct evidence of intentional discrimination in the entertainment industry is extremely difficult—if not impossible—because casting criteria are often highly subjective.

Unlike traditional television programs, reality television programs often use an open casting system and invite the public to audition for their


24. Russell K. Robinson, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 CALIF. L. REV. 1, 6 (2007). One law professor has explained that this reluctance to diversifying television stems from the fact that "network programming decisions are based on economic considerations" and producers' belief that "[t]here's not enough money in diversity to make it a priority." Burr, supra note 23, at 174.


26. Id. at 11 (quoting Interview with Reuben Cannon, former casting director and producer of Diary of a Mad Black Woman, in Los Angeles, Cal. (Sept. 29, 2005)).

27. Id. at 9. Although Professor Robinson's article focuses on discrimination in Hollywood's movie industry, Breakdown Services’ casting system is not limited to movies. See Who We Are, BREAKDOWN SERVS., https://breakdownservices.com/index.cfm/main/about (last visited Feb. 21, 2014) ("Breakdowns that are released to talent representatives include episodics, pilots, feature films, movies for television . . . reality tv, and many other types of projects that require acting talent.").


29. Id. at 7.

30. Id. at 6–7.
A typical open casting process solicits online applications available through a show’s website, including several photos and a short-length video of the applicant to demonstrate his or her personality and suitability for the show, phone interviews, and subsequent background checks if selected as semifinalists and finalists. Additionally, producers hold open casting calls at locations throughout the country, information of which applicants can find on the Internet and television.

Although announcements of such open casting calls do not typically involve any sex, race or color classifications, they usually set application criteria specifically tailored to the nature of the program. For example, *The Bachelor* and *The Bachelorette* require that applicants be “single,” meaning they are not “involved in [a] committed intimate relationship,” and free of past criminal record, including “a restraining order entered against them.” Game shows like *Survivor* require that contestants be in “excellent physical and mental health,” so that they can cope with the changing weather and environments during the filming of the show. Talent search shows like *American Idol* call for ordinary people’s talent or passion. Thus, none of these casting calls overtly discriminate against minorities.

31. Id.; Caitlin Cecil, *Casting Reality TV*, http://www.rtvmediastudies.tcu.edu/Casting.htm (last visited Feb. 21, 2014) (explaining that open casting calls invite “people from all over” to visit the major U.S. cities where *American Idol* holds its initial casting calls); see also *The Bachelor Casting Calls*, http://casting.bachelor.warnerbros.com/web/castingdisplay/cd.jsp (last visited May 3, 2014) (posting open casting calls’ locations and dates online to invite the public to become the Bachelor for Season 19); *Season 13 Audition Cities Announced*, *AMERICAN IDOL XIII* (May 7, 2013), http://www.americanidol.com/news/season-13-audition-cities-announced (posting open casting calls in seven major U.S. cities to invite the public “to become the next superstar!”).


33. Id. at 990.


35. Id. at ¶ 7.


37. See *American Idol Season 13 Registration and Audition Rules 1*, AMERICAN IDOL, available at http://media.americanidol.com/season_13_auditions/a13_Rules.pdf (last visited Mar. 5, 2014) (requiring that an applicant not have, among others, “a contract for talent representation,” “current music recording contract,” “current music publishing contract,” or “exclusive acting contract”); see also *Top Chef Now Casting Season 12 FAQs*, BRAVO, http://www.topchefcasting.com/faqs (“If you have the passion and talent for cooking, you are exactly who we’re looking for! If you are a restaurateur, executive chef, chef de cuisine or sous chef—you are encouraged to apply!”) (last visited Mar. 5, 2014).
Discrimination in the selection process can, however, occur at any stage of the process because online applications require photos and videos of applicants. This requirement does not by itself violate Title VII, but learning race or color (or any other protected categories) of an applicant prior to an interview could "increase the risk of discrimination or the appearance of the discrimination." Moreover, just like any other in-person job screening process, a production company's employees can screen applicants at a casting call location. For example, Claybrooks plaintiffs alleged that white employees of the defendants treated the plaintiffs differently than white applicants at their respective casting call locations. Those employees allegedly sent Mr. Johnson home, without an interview, though they allowed white applicants to proceed to the interview location. Mr. Claybrooks, who went to a different casting location, got to the interview stage, but his interview was significantly shorter than the average forty-five minutes afforded to white applicants. Neither of them heard back from the producers after they submitted their applications.

C. Current Legal Landscape

Although the Claybrooks lawsuit was dismissed early, it certainly confronted intentional discrimination and racial segregation in popular television. It was the first case that challenged discriminatory casting in reality television, and garnered a lot of publicity and attention from media, provoking criticism from newspapers and webblogs nationwide. The outcome of this case, however, left open the question whether similarly
discriminated plaintiffs could consider a Title VII claim as an alternative to, or in addition to, an equal rights claim.45

Prior to Claybrooks, no one had directly challenged discriminatory casting in the entertainment industry, perhaps because the industry is largely “relationship-driven,” and confronting discrimination could threaten many actors’ career.46 Moreover, the public, as well as reality show applicants themselves, may not even consider the possibility that participating in reality television shows is “employment.”47 On one hand, if the law prohibited discriminatory casting in reality television, most people would find such legal constraints quite “bizarre” because the idea may be “wholly antithetical to the First Amendment.”48 On the other hand, if no differences could distinguish the reality television casting process from a typical job screening process, intentionally excluding people of color from the lead role threatens equal employment rights.49

In the traditional television context, the Screen Actors Guild–American Federation of Television and Radio Artists (“SAG-AFTRA”)50 prohibits unlawful discrimination against “its members and others employed under its collective bargaining agreements.”51 Performers have two potential ways to benefit from the union’s policy against unlawful discrimination and harassment. First, those who wish to join the union must submit proof of employment for a position covered by a SAG-AFTRA collective bargaining agreement, and pay the national initiation fee of $3,000.52 Second, performers who obtain a role on a television program registered

45. The Claybrooks Complaint only alleged claims under 42 U.S.C. § 1981, an equal rights provision that prohibits racial discrimination in the making and enforcing of contracts. See generally Claybrooks Complaint, supra note 1.

46. Robinson, supra note 24, at 5 n.12.

47. Cf. Carley G. Mak, Note and Comment: Fame, Fortune, and... Fourteen-Hour Days? Open Casting Calls for Reality TV Contestants Are Pre-Employment Tests and Public Accommodations Under the Americans With Disabilities Act, 26 LOY. L.A. ENT. L. REV. 523, 525 (2006) (arguing that contestants in talent search shows, such as American Idol and America’s Next Top Model, are essentially competing for “employment as recording artists and models, respectively”). In comparison, contestants in The Bachelor and The Bachelorette are competing for love and marriage, but such shows allow network producers to “create” celebrities and presumably reap benefits from their talents and labor.

48. See Robinson supra note 24, at 1.

49. See id. at 2 (describing the problematic nature of sex and race preferences in casting announcements when they are placed in the context of employment discrimination law, but not “[w]hen viewed through the lens of artistic freedom”).

50. SAG-AFTRA is a union representative to “more than 160,000 media professionals,” who are “the faces and voices that entertain and inform America and the world.” Union Information, SAG-AFTRA, http://www.sagaftra.org/union-information (last visited Oct. 3, 2014).


with SAG-AFTRA are protected under a collective bargaining agreement that binds the network and producers.\textsuperscript{53} To hire union member actors, a network must register a television program with the union.\textsuperscript{54} Nevertheless, the current industry practices prevent non-actor applicants for a reality program from joining the union or benefiting from a covered program. Networks rarely register a reality program with SAG-AFTRA because they do not have to hire union-member actors when they can easily find "contestants" through open casting calls.\textsuperscript{55} Thus, even if a non-actor applicant were able and willing to pay the required initiation fee and union dues, the applicant would not likely secure a union job.

This dilemma is further complicated by the fact that non-actors, if cast on a reality program, are labeled as "contestants" or "participants,"\textsuperscript{56} rather than "employees." They are often considered "independent contractors,"\textsuperscript{57} who are exempted from the protection of Title VII (or of any other employment law).\textsuperscript{58} Taken together, the current industry practices leave reality television "participants" squarely outside of any legal protection. Pinpointing the wrongdoer is extremely difficult because nothing in this context clearly violates the law unless these individuals qualify as employees within the meaning of federal or state antidiscrimination laws.

The general lack of precedent on discrimination cases in the entertainment industry\textsuperscript{59} is most likely a result of the robust First


\textsuperscript{55} See, e.g., Auditions & Open Casting Calls, BACKSTAGE, http://www.backstage.com/casting/open-casting-calls/reality-tv/?page=1 (last visited May 8, 2014) (showing fifty-five of seventy-five open casting calls for reality television are nonunion jobs and the rest of twenty are both union and nonunion).

\textsuperscript{56} Westerman, supra note 13, at 406 (explaining that reality television producers save a substantial amount of money by hiring "'participants,' rather than actors with significant celebrity status").

\textsuperscript{57} Hopkins, supra note 13, at 17 (arguing that reality television producers hire actors or contestants as "independent contractors" to avoid liability).

\textsuperscript{58} Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004).

\textsuperscript{59} See Michael J. Frank, Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?, 35 U.S.F. L. REV. 473, 474 (2001) (stating that as of 2001, no one had ever filed a lawsuit for discriminating against minority
Amendment protection historically afforded to "creative" decision-making processes such as casting. The United States judicial system favors First Amendment protections over the competing constitutional interest of equality in media. Moreover, research found only one employment discrimination case against a reality television producer, which the parties settled out of court.

III. Application of Employment Discrimination and Civil Rights Statutes to Reality Television Casting Decisions

Despite Title VII's explicit ban on racial preferences when making job announcements, the current case law and statutory scheme virtually exempt casting preferences from this ban. Discrimination plaintiffs can also consider other federal or state civil rights statutes. One legal scholar argued that "more challenges in different districts in order to get a full and fair hearing in court, more publicity, and perhaps even a favorable verdict," are absolutely necessary to promote diversity in reality television. This section will evaluate claims under four different statutory schemes that a plaintiff can explore. It will also analyze potential legal challenges that a plaintiff must overcome in order to successfully litigate discrimination claims.

A. Claims

1. Race Discrimination Under Title VII of the Civil Rights Act of 1964

Federal and state employment discrimination laws ban discriminatory hiring practices based on an applicant's race, among other protected characteristics. Title VII, as well as many state statutes, provides employees who have suffered such discrimination with a cause of action...
against their discriminatory employers. If a reality television applicant believes he or she was denied an audition because of race (or any other protected categories), the excluded applicant may file a claim under Title VII, a state employment discrimination statute, or both.

But not all employers are potential antidiscrimination defendants. For an employer to even be subject to Title VII’s antidiscrimination requirements, it must have “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” Major networks and production companies likely meet this threshold, so the crux of a court’s analysis would depend on whether the plaintiff could qualify as an employee of the purported employer.

Title VII defines an “employee” as “an individual employed by an employer,” but, as the Supreme Court noted, this definition “is


64. Title VII prohibits an employer from refusing to hire a person because of his or her race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(1). Further, it prohibits an employer from limiting or segregating “applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.” Id. § 2000e-2(2) (emphasis added).

65. For example, California’s FEHA prohibits employment discrimination. See CAL. GOV. CODE § 12940. The California Legislature intended to cast a broader net than Congress did through Title VII, so the FEHA prohibits discrimination based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person.” Id. § 12940(a). Nevertheless, when analyzing FEHA claims, California courts follow the framework set by the United States Supreme Court under Title VII. Sada v. Robert F. Kennedy Med. Ctr., 56 Cal. App. 4th 138, 148 (1997); see also Beyda v. City of Los Angeles, 65 Cal. App. 4th 511, 517 (1998) (quoting Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409, 1416, fn. 5 (1993)) (noting the appropriateness of considering “federal cases interpreting Title VII” because employment discrimination was “an area of emerging law” in California). Similarly, New York’s Human Rights Law prohibits employment discrimination that prevents an individual from receiving “an equal opportunity to enjoy a full and productive life.” NY EXEC. § 290 (McKinney 2014). Like California, New York follows the framework under Title VII in analyzing employment discrimination. Helmes v. S. Colonie Cent. Sch. Dist., 564 F. Supp. 2d 137, 146 (N.D.N.Y. 2008). Forty-six other states, except Alabama, and the District of Columbia have laws that prohibit employment discrimination because of race. See Analysis of State Law, 4 Emp. Discrim. Coordinator § 1:9 (WEST, Updated Sept. 2014). This note analyzes racial discrimination in reality television according to the definitions and framework under Title VII. It will, however, also introduce federal and California civil rights laws as alternative means to bring suit when litigants cannot establish an employment relationship under Title VII. See infra discussions at III.A.2 and III.A.3.

66. State laws often cover a broader range of protected categories. See, e.g., CAL. GOV. CODE § 12940.


completely circular and explains nothing." Consequently, in determining whether a plaintiff is an employee, courts evaluate whether the purported employer has the right to control the plaintiff's employment opportunities. Most networks and producers will deny that reality television applicants are "applicants for employment." Thus, one of the first challenges for a reality show applicant plaintiff is meeting the burden of proving that had he or she been cast, an employment relationship would have existed between the parties.

In determining the existence of an employment relationship, courts apply the common law agency test. In *Community for Creative Non-Violence v. Reid*, the Supreme Court outlined the thirteen factors that comprise the common law agency test:

- the hiring party's right to control the manner and means by which the product is accomplished;
- the skill required; the sources of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.


70. See Diana v. Schlosser, 20 F. Supp. 2d 348, 352 (D. Conn. 1998) (concluding that an employment relationship existed between a news reporter and a radio broadcasting company because the latter had control over the reporter's employment opportunities); see also Alfred v. Tenn. Farmers Mut. Ins. Co., 8 F. Supp. 2d 1024, 1028 (E.D. Tenn. 1997) (noting that "[c]ontrol of job performance and employment opportunities" is "the most important factor" in determining the existence of an employment relationship).

71. 42 U.S.C § 2000e-2(a)(2). Whether the excluded applicant had "actual or prospective employment relationship" with the producer is irrelevant to this analysis. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from failing or refusing to hire any individual, "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race" and other protected categories); see also Diana, 20 F. Supp. 2d at 350-52 (listing a line of decisions that have concluded that an employment relationship exists where the purported employer effectively controls the worker's employment opportunities, even where the parties stipulate that they did not agree to an employment relationship).


73. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work.").

Courts place the greatest emphasis on the degree of control the purported employer exercises over the details of the plaintiff’s work, but no one factor is dispositive. Thus, the courts evaluate the totality of the circumstances surrounding the parties’ relationship.\textsuperscript{75}

In \textit{Alberty-Velez v. Corporacion de P.R. Para La Difusion Publica}, the United States Court of Appeals for the First Circuit concluded that the plaintiff-actress was not an employee, even though the employer dictated the manner, hours, and location of her work.\textsuperscript{76} Six factors other than the control factor weighed against classifying her as an employee, and the court concluded that she was an independent contractor.\textsuperscript{77} The court acknowledged that the degree of control exercise is “often critical to the independent contractor/employee analysis,” but that it “must be considered in light of the work performed and the industry at issue.”\textsuperscript{78} The court reasoned that the tasks that the actress performed required her to follow directions to achieve the director’s goal of producing the program,\textsuperscript{79} and to hold otherwise “would defy ‘common sense’ as it would result in classifying all actors as employees, regardless of the other aspects of the relationship.”\textsuperscript{80} The court also relied heavily on the high level of skill required to do the plaintiff’s work, which gave her the bargaining power to choose between becoming an employee of a particular television station and freelancing as an independent contractor.\textsuperscript{81} Thus, it was the actress who “controlled the extent to which she wished to commit her professional time to filming.”\textsuperscript{82}

The working conditions involved with being a reality television “participant” are different in many ways from those involved with a professional actor or actress. Like the television station in \textit{Alberty-Velez}, the reality television producers control the details of the participants’ activities while filming a reality show. But unlike the professional acting context, reality television producers control every aspect of the participants’ \textit{lives} for the duration of the filming.\textsuperscript{83} The participants have

\begin{itemize}
\item \textsuperscript{75} Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992).
\item \textsuperscript{76} Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004).
\item \textsuperscript{77} \textit{Id.} at 7–8.
\item \textsuperscript{78} \textit{Id.} at 9.
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.} (citing Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 491–92 (8th Cir. 2003)).
\item \textsuperscript{81} \textit{Id.} at 9–10.
\item \textsuperscript{82} Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 10 (1st Cir. 2004).
\item \textsuperscript{83} The degree of control is so extreme that it is inhumane. One former participant on \textit{The Bachelor}, who was one of twenty-five suitors for Season 17’s Bachelor, stated in an interview
\end{itemize}
very little control over what they should say; when they should be filmed, i.e., when they should work; where they should work; and where they should live. On the day the participants arrive at the Bachelor mansion, the producers take the participants’ phones and computers away. They “are not allowed to speak to friends and family until [they] get home.”

Thus, unlike the working conditions of the professional actress in Alberty-Velez, the controlled environment on The Bachelor and The Bachelorette leaves the participants with no meaningful opportunity to devote time to, or

that producers constantly offer alcohol to get the participants “to be more talkative”; that “The Bachelor cameras never stop rolling”; and that “the hardest part of filming the show is being away from family, and having zero alone time.” Anna Klassen, ‘The Bachelor’: Ex-Contestant Leslie Hughes Spills Nine Secrets About the Show, THE DAILY BEAST (Mar. 10, 2013), http://www.thedailybeast.com/articles/2013/03/10/the-bachelor-ex-contestant-leslie-hughes-spills-nine-secrets-about-the-show.html. On the first night she arrived at the Bachelor mansion (where the participants must live for the duration of filming), the filming began at 7 p.m. and did not finish until 8 a.m. next day. Id.

84. See, e.g., Benardo v. American Idol Prods., Inc., No. 1:11-cv-00625-CM, 2011 WL 2565489, at *1 (S.D.N.Y. June 21, 2011) (stating that an American Idol applicant alleged in his complaint that the producer’s “employees asked him to ‘gay it up’ on camera,” and that the producer “actually conditioned [the plaintiff’s] appearance on [Simon] Cowell’s last show on his willingness to act ‘outrageous,’ ‘extra flamboyant,’ and ‘really gay’ to the greatest extent possible”).

85. For example, the producer of The Bachelor and The Bachelorette requires that:

Each applicant acknowledges, understands and agrees that he or she, if chosen as a bachelor or bachelorette on the Program, may be audio and/or video taped twenty-four (24) hours a day, seven (7) days a week while participating in the Program by means of open and hidden cameras, whether or not he or she is then aware that he or she is being videotaped or recorded (collectively, ‘Recordings’) and that such Recordings may be disseminated on television and/or all media now known or hereafter devised, in any and all manner throughout the Universe in perpetuity.

The Bachelor and The Bachelorette Casting Eligibility Requirements, supra note 34, at ¶ 10.

86. See id. at ¶ 20 (“Dates and/or location to be determined and subject to change in Producer’s sole discretion.”); id. at ¶ 21 (“Bachelor(s) and Bachelorette(s) must agree to live, participate and cooperate with the other individuals and the Producer during the taping of the Program.”); id. (“Bachelor(s) and Bachelorette(s) must be able to travel for long periods of time, must be adaptable to various living situations, and must enjoy participating and living in close proximity with others of varied background and experience.”); id. at ¶ 22 (“The Bachelor(s) and The Bachelorette(s) must report and be available to participate in the Program at all times and places as Producer shall designate.”).

87. Id. at ¶ 21; see also Survivor Casting Call, supra note 36 (“Our competitors must be willing to commit to traveling and living in a remote location for approximately seven weeks.”); What It’s Really Like To Be On the ‘Bachelor’: Your FAQ Answered!, THE ASHLEY’S REALITY ROUNDUP (July 24, 2011), http://theashleysrealityroundup.com/2011/07/24/what-its-really-like-to-be-on-the-bachelor-your-faq-answered/ [hereinafter The Bachelor FAQ Answered] (stating that The Bachelor contestants “can not leave the house [the Bachelor mansion] ever”).

88. Id.

89. Id.
even to find, other employment or freelancing opportunities. They neither hold skilled positions, nor do they have freedom to choose between becoming an employee and freelancing in the entertainment industry. Thus, as long as the producers continue to label them as “contestants,” they are freelancing without the option to become an employee.

Moreover, working on a reality television show often requires the selected participants to leave their paying job, either by quitting or taking a leave of absence, for the duration of filming. Selected individuals must “be available to participate in the Program at all times and places as Producer shall designate.” For example, on February 28, 2014, Deputy District Attorney Andi Dorfman of Fulton County, Georgia, reportedly left her job during a murder trial so she could film the next season of The Bachelorette. Although her request was “highly unusual,” her employer was “willing to grant [her] request, albeit with certain caveats” that her leave would be unpaid and that she would have until May 31, 2014, to return to work.

The courts should view the working conditions on a reality television show as the functional equivalent of working all day for the producers. To appear on a show, the participants must consent to the cameras recording their activities twenty-four hours, seven days a week. Even though most reality programs take anywhere from three months to six months to film, thereby weighing against the duration of the parties’ relationship factor, such a serious time commitment would leave the participants with no meaningful opportunity to seek other employment or freelancing opportunities.

90. See id. ("Q: How are the contestants able to get off of work for so long to compete on the show? A: . . . ‘Many girls quit their jobs to come on the show.’").

91. The Bachelor and The Bachelorette Eligibility Requirements, supra note 34, at ¶ 22 (emphasis added).


94. The Bachelor and The Bachelorette Eligibility Requirements, supra note 34, ¶ 10; see also Survivor Casting Call, supra note 36 ("Contestants will be filmed up to 24 hours a day by television camera crews to be broadcast on national television."); see also Klassen, supra note 83 ("The Bachelor cameras never stop rolling. ‘They are on you all the time.’").

95. Cf. Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 10 (1st Cir. 2004) (discussing Dykes v. Depuy, Inc., 140 F.3d 31, 34-36 (1st Cir. 1998) and Speen v. Crown Clothing Corp., 102 F.3d 625, 627 (1st Cir. 1996)) (concluding that Alberty’s sixteen-month relationship with the defendant did not impact the court’s decision that she was an independent contractor, similar to the court’s decisions in Dykes (six-year relationship) and Speen (twenty-year relationship)).
Courts, however, will evaluate every aspect of the parties’ relationship, not just the control factor. The *Alberty-Velez* court, for example, found that several other factors weighed in favor of classifying the actress as an independent contractor.\(^96\) The plaintiff-actress provided her own tools and instrumentalities to perform her work—"she provided, or obtained sponsors to provide, the costumes, jewelry, and other image-related supplies and services necessary for her appearance."\(^97\) The television station could not assign the actress to tasks other than the tasks described in her contracts.\(^98\) She received a lump sum payment for each episode and did not get paid for the work she did not perform.\(^99\) The television station did not provide the actress with any fringe benefits, and she paid her own taxes.\(^100\) The court did find that the actress was part of the television studio’s regular business, which was the only factor that weighed in favor of classifying her as an employee.\(^101\)

Participants on *The Bachelor* and *The Bachelorette* initially bring their own dresses and makeup for filming,\(^102\) but once they arrive at the mansion, they end up receiving "a lot of cool clothes, shoes, luggage, and sunglasses."\(^103\) They also enjoy "various other benefits of participating... on either Show, including fully paid housing, food, and travel expenses."\(^104\) The producers require that the participants live in the Bachelor mansion while filming, and once they arrive there, they are "at the mercy of the producers."\(^105\) They may not leave the mansion unless they travel to "new cities and exotic locations" for filming.\(^106\) Even then, "sightseeing is pretty much out of the question."\(^107\) Thus, the participants provide some of their own clothes and makeup, but the producers provide the essential tools and instrumentalities for the participants to perform on the show, including travel expenses, expenses associated with dating activities on the show, and housing.

Some factors will weigh against finding non-actors on reality television as employees. For example, they do not receive regular paychecks, fringe

\(^96\) *Id.* at 7.
\(^97\) *Id.*
\(^98\) *Id.* at 8.
\(^99\) *Id.*
\(^100\) *Id.*
\(^101\) *Alberty-Velez*, 361 F.3d at 10.
\(^102\) *The Bachelor FAQ Answered*, supra note 87.
\(^103\) *Id.*
\(^105\) *The Bachelor FAQ Answered*, supra note 87.
\(^106\) *Id.*
\(^107\) *Id.*)
benefits or tax benefits. The parties rarely believe that they are creating an employment relationship because the producers cast the participants as contestants, not employees. The courts, however, should recognize that the producers create these circumstances by hiring free labor for the projects from which they make tens of millions of dollars. Moreover, in the reality television context, the producers’ control over the participants’ entire lives is too extensive such that the control factor should simply outweigh the factors that weigh in favor of classifying them as independent contractors.

Although this issue has never been addressed in the reality television context, courts have dealt with the employee classification analysis in many other industries. They have reached inconsistent conclusions on similar facts involving different industries because they are often tasked with finding the definition of “employee” under a myriad of different circumstances. As Alberty-Velez suggests, the nature of the television industry adds another dimension to the already complicated test. Nevertheless, no court has decided on this issue in the reality television context.

108. See id. ("Q: Do the girls get paid to compete on the ‘Bachelor’? A: ‘Not one single penny,’ said Ashleigh Hunt. However, the Bachelorette/Bachelor is paid a hefty sum for starring on the show."). The “hefty sum” that the Bachelor or Bachelorette receives is “a stipend.” Claybrooks, 898 F. Supp. 2d at 989.

109. Reality television producers that refuse to label contestants as “employees” for purposes of Title VII protections, have no qualms about calling them “employees” to protect the producers’ intellectual property rights. For example, in a discrimination suit against the producers of American Idol, the producers “maintained that the plaintiffs were ‘contestants on a reality singing competition, not employees under Title VII.’” Luchina Fisher, ‘American Idol’ Discrimination Suit Moves Forward, ABC NEWS (Sept. 23, 2013), http://abcnews.go.com/Entertainment/contestants-employees-american-idol-discrimination-lawsuit-moves-forward/story?id=20240495&page=2. Nevertheless, the Production Deal Memo between American Idol Productions, Inc. and one of the plaintiffs has revealed that the producers require American Idol contestants to sign a contract that explicitly refers to them as “employees” whose services are “deemed ‘Works Made For Hire’ for Producer within the meaning of the U.S. Copyright laws.” Production Personnel Deal Memo, ¶2, AMERICAN IDOL PRODS., INC., Mar. 3, 2003, available at http://abcnews.go.com/Entertainment/page/employment-eligibility-verification-form-signed-american-idol-season-20319974; see also 17 U.S.C. § 101(1) (2014) (defining a “work made for hire” as “a work prepared by an employee within the scope of his or her employment”). Interestingly, the inquiry into the employment status of an applicant under the Copyright Act is similar to the inquiry under Title VII. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989). Under Title VII, producers benefit if they classify reality television actors as independent contractors. When the producers wish to secure the copyright of a reality show, however, they conveniently classify the actors as employees because the employer is the owner of a copyright if it had contracted for a creative work prepared by an employee within the scope of employment. See id. at 744 n.9. The proper classification of a reality show actor’s employment status should not depend on whether one term would create more legal obligations on the actor’s part or not, and courts should take notice of this double standard created by industry practices.

110. See Ocasio v. RAAD Broad. Corp., 954 F. Supp. 2d 67, 74 (“The fact that RAAD nominally hired [the plaintiffs] and other producers as independent contractors ... says little about what type of control it had over the production of the show.”).
context. Thus, a continuous application of Title VII to discriminatory casting decisions involving different facts and circumstances may be one way to settle the law in this area.\footnote{111}

Courts should take into consideration whether a blanket ruling that protects discriminatory casting practices under the First Amendment is fair, and whether it is consistent with constitutional rights. Certainly, it would require the courts to find the balance between artistic freedom and employment rights (a dichotomy that is difficult to reconcile), but the courts should not allow the nature of the industry to immunize itself from the application of employment discrimination law.\footnote{112}


Where a court decides that a reality television participant is not an employee under Title VII, he or she may have recourse under 42 U.S.C. § 1981.\footnote{113} Section 1981 applies only to racial discrimination in the formation and enforcement of private and public contracts,\footnote{114} including post-formation conduct within contractual relations.\footnote{115} Despite this limitation, section 1981 has an important advantage over Title VII for reality show applicant plaintiffs where courts find that they are independent contractors.

\footnote{111}{Of course, a continuous application of Title VII to discriminatory casting is possible only if discriminated individuals are willing to come forward with their complaints.}

\footnote{112}{See, e.g., Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) ("The business of the Associated Press is not immune from regulation because it is an agency of the press...[It] has no special privilege to invade the rights and liberties of others."). In Associated Press, the petitioner, the publisher of a newspaper, argued that the National Labor Relations Act abridged the petitioner’s freedom of the press because it could not “be free to furnish unbiased and impartial news reports unless it [was] equally free to determine for itself the partiality or bias of editorial employees.” Id. at 131. The Court called this argument “an unsound generalization,” and concluded that the Associated Press was not immune from the NLRA. Id. at 131-33.}

\footnote{113}{See 42 U.S.C. § 1981 (2014) ("[A]ll persons...shall have the same right...to make and enforce contracts...as is enjoyed by white citizens..."). This section is recognized as a constitutional exercise of Congress’ power to enact appropriate legislation for the enforcement of the provisions of the Equal Protection Clause of the Fourteenth Amendment. Waters v. Wis. Steel Works of Int’l Harvester Co., 427 F.2d 476, 483 (7th Cir. 1970); see also Johnson v. Ry. Express Agency, 421 U.S. 454, 459 (1975) (stating that a discrimination plaintiff “clearly is...not limited to Title VII in his search for relief”).}


The statute applies more broadly than Title VII—to all contracts, including employment contracts— independent of a plaintiff’s Title VII claims. As the Supreme Court stated in Johnson v. Railway Express Agency, Inc., a plaintiff can bring a Title VII claim and a section 1981 claim together "based upon the same facts." To have an actionable claim under section 1981, a plaintiff must allege that the purported employer unlawfully discriminated against the plaintiff such that the conduct at issue interfered with the plaintiff’s right to make or enforce contracts. Thus, even if a court concludes that the plaintiff is not an employee under Title VII, the plaintiff may still proceed on the section 1981 claim on the basis of the alleged contractual relationship. In this respect, section 1981 provides an additional form of pleading unlawful employment discrimination.

Additionally, a plaintiff who proves intentional discrimination under Title VII would also be entitled to compensatory and punitive damages "to the same extent and under the same standards that they are available to plaintiffs under [section] 1981." This statute, however, "is simply under-invoked" because litigants and attorneys are not as familiar with it as they are with Title VII. As a result, independent contractors tend to sue under Title VII, rather than section 1981, which leads to a dismissal of the suit. Unsurprisingly, to analyze a section 1981 claim, courts apply the same legal framework applied to determine the existence of an employment relationship under Title VII. Proving intentional discrimination, however, is just as complicated as proving the existence of an employment relationship. To evaluate circumstantial evidence of discrimination under section 1981 (or Title VII), courts engage in a three-step burden-shifting framework. First, the plaintiff has the initial burden to establish a prima facie case of discrimination. Second, assuming the plaintiff meets his or


120. Lowery, 206 F. 3d at 441.


122. Id.

123. Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). As discussed infra Part II.B, however, finding direct evidence of intentional discrimination is extremely difficult, and as such, most plaintiffs will have to prove their cases through circumstantial evidence.

her initial burden, the burden shifts to the defendant, who must articulate a “legitimate, nondiscriminatory reason” for taking the action in question.125 Finally, provided the defendant was able to sufficiently articulate such a reason, the plaintiff must show that the defendant’s stated reason was pretextual.126

A plaintiff can meet the initial burden of making out a prima facie case of hiring discrimination by showing that: (1) he belongs to a protected class; (2) he was qualified for the position for which he applied; (3) he was nonetheless denied the position; and (4) a similarly situated person outside his class was treated differently (i.e., that person obtained the position instead or under circumstances giving rise to an inference of discrimination).127 Had the plaintiffs in Claybrooks had the opportunity to litigate their Title VII claim, proceed on their section 1981 claim, or litigate both claims, they would have met their initial burden.128 They were both African-American, a protected category under both Title VII and section 1981. They likely qualified for the Bachelor position because they were both single, well-respected members of their communities, well-educated and well-established professionals.129 They were both denied for the position, and instead a white male, who would likely be a similarly situated applicant, became the Bachelor.130

In the traditional employment context, finding a similarly situated person outside of the plaintiff’s class, who obtained the precise position, is often the most challenging task because the comparator “must be similarly situated in all material respects.”131 Courts often compare the comparator’s prior work experience to that of the plaintiff132 (or terms of services if the

125. Green, 411 U.S. at 802.
126. Id. at 804.
127. Id., 411 U.S. at 802; Burdine, 450 U.S. at 253.
128. To determine whether the First Amendment is an affirmative defense to the plaintiffs’ section 1981 claim, the court assumed that the producers “did discriminate on the basis of race.” Claybrooks v. ABC, 898 F. Supp. 2d 986, 997 (M.D. Tenn. 2012). Nevertheless, the court never reached the question whether the plaintiffs carried their initial burden of making out a prima facie case of intentional discrimination on the ground that “the First Amendment protects the producers’ right unilaterally to control their own creative content.” Id. at 1000; see generally id. at 996–1000.
129. See Claybrooks Complaint, supra note 1, at 4–5; see also The Bachelor and The Bachelorette Eligibility Requirements, supra note 33.
130. Claybrooks Complaint, supra note 1 at 11–12.
132. See Lawrence v. Mehlman, 389 F. App’x 54, 57 (2d Cir. 2010) (concluding that plaintiff was not similarly situated with alleged comparator because plaintiff “was significantly more experienced” than comparator); Bio v. Fed. Express Corp., 424 F.3d 593, 597–98 (7th Cir. 2005) (concluding that a four-year gap in experience between plaintiff and alleged comparator “precludes a finding that the two were similarly situated”).
plaintiff is an independent contractor). In the context of *The Bachelor*, finding similarly situated comparators would not be too onerous because the show does not involve any prior related work experience in the related field or certain terms of services, such as pricing offer, as casting criteria. This situation is also different from other employment situations in the entertainment industry, which would have at least the prior work experience factor to compare a plaintiff to a comparator.

As illustrated, a section 1981 claim is an attractive choice for employment discrimination claims because a plaintiff may plead both Title VII and section 1981 claims based on the same facts. Moreover, even those plaintiffs who do not qualify as "employees" under Title VII can pursue a section 1981 claim if discrimination occurred within a contractual relationship. Nevertheless, if courts allow the First Amendment as a complete bar to section 1981 claims, producers that make unscripted reality shows using open casting calls (as opposed to Breakdown services) will continue to escape any legal obligations under section 1981.134

4. State Civil Rights Law—California as an Example

A third potential claim would arise under a state civil rights statute, such as California’s Unruh Civil Rights Act (the “Unruh Act”). For example, if discrimination occurs within California, the plaintiff could argue that the producer violated the Unruh Act by denying access to an open casting call, which invited the general public. This Act protects all persons within its jurisdiction from arbitrary discrimination based on race, color, or a number of other protected categories, by “all business establishment of every kind whatsoever” in furnishing “accommodations, advantages, facilities, privileges, or services.”

The Unruh Act does not apply to employment discrimination. As such, where a court finds that the plaintiff is an independent contractor, the

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133. See, e.g., Harris v. Hays, 452 F.3d 714, 718–19 (8th Cir. 2006) (concluding that plaintiff was not similarly situated with alleged comparators because the plaintiff did not make similar pricing offers).

134. See supra Part II.A. for distinctions between scripted television shows and unscripted shows.

135. See infra Part III.B.1. for discussion on the First Amendment as an affirmative defense to discrimination claims.


137. Id. § 51(b) (emphasis added). Other protected categories are sex, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, and sexual orientation. Id.

138. Alcorn v. Anbro Eng’g, Inc., 2 Cal.3d 493, 500 (1970). One California court has ruled that the Unruh Act does not cover “the claims of an independent contractor.” Cochran v. CBS Corp., No. BC432836, 2011 WL 9522592 (Cal. Super. Ct. Sept. 27, 2011). At the time of writing this note, an exhaustive examination of approximately 1,800 cases filed under the Unruh Act
plaintiff could invoke the Unruh Act by arguing that a casting call is a public accommodation. Like section 1981, the Unruh Act prohibits only intentional discrimination, and requires a plaintiff show that a business establishment has committed "willful, affirmative misconduct," which is "more than the disparate impact of a facially neutral policy." In National Federation of Blind v. Target Corp., the court found that the Target.com website was a business establishment because it is a place "to which the general public is invited." In Cullen v. Netflix, Inc., the court found that Netflix's online streaming video library was "a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation." In Greater L.A. Agency on Deafness, Inc., the court did not disagree with the plaintiff's allegation that closed captioning service was a public accommodation because it provides access to "benefits and advantages offered by CNN.com." Thus, the Act covers a wide variety of entities and accommodations, regardless of their nexus to a physical location, as long as the transaction is commercial in nature, and once engaged, has the potential to provide accommodation, privilege, or benefits to the general public.

In U.S. Western Falun Dafa Association v. Chinese Chamber of Commerce, the plaintiff sued the defendant for denying several of the plaintiff's application to operate a booth at an annual street fair, which "is

revealed that only this one case involved an employment discrimination claim. The plaintiff, however, linked her claims under the Unruh Act with her employment, and the court disagreed with her that her claims fell under the Act. Id. The vast majority of cases filed under the Unruh Act have dealt with discrimination in public accommodation because of disability. But, as already explained in detail, the Act covers all kinds of business establishments and commercial transactions not stemming from employment.

140. CAL. CIV. CODE § 51.
142. Id. at 1198.
144. Greater L.A. Agency on Deafness, 742 F.3d at 421.
open to the public to attend.\textsuperscript{145} For its Unruh Act analysis, the court treated the street fair as a public accommodation that invited the public to attend and participate.\textsuperscript{146} Similarly, open castings calls invite the public to submit applications to attend the audition and to participate in a competition, which provides entertainment to the general public.

On the other hand, in \textit{Ingels v. Westwood One Broadcasting Services, Inc.}, the plaintiff sued a radio broadcasting company for refusing to allow him to participate in a call-in radio talk show because of his age.\textsuperscript{147} The court found that the talk show was not a public accommodation to which the Unruh Act applied because the First Amendment allowed the radio station to refuse or accept certain speakers on the talk show.\textsuperscript{148} Thus, according to the \textit{Ingels} court, a talk show is deemed not open to the general public because the First Amendment allows a radio station to lawfully exclude certain people from participating in the talk show.

As the above two cases demonstrate, it is difficult to predict whether a court will find that an open casting call for a reality television is a public accommodation. A case similar to \textit{Claybrooks} would be a question of first impression under the Unruh Act. Instead of agreeing with the \textit{Ingels} court, perhaps a court could decide that a caller-screening process on an on-air radio talk show is fundamentally different from denying a certain class of people equal access to an audition that is open to the general public. The court can also draw the main distinction from the fact that a radio caller calls in to a talk show to give his opinion, and if his opinion is not appropriate for the image of the show, the radio station arguably need to control which callers to be on the air.\textsuperscript{149} On the other hand, single people apply to audition for \textit{The Bachelor} and \textit{The Bachelorette} to compete on the show, not to be the voice or to give an opinion on behalf of ABC. Moreover, the plaintiff in \textit{Ingels} was sixty-five years old when the show was described as “an extremely popular singles-oriented radio talk show” that attracted young people, thereby not exactly meeting the show’s demographic.\textsuperscript{150} Racial discrimination during an audition for most reality television shows is different because the shows do not openly seek Caucasian only. For example, ABC’s own website states that the show has

\begin{thebibliography}{99}

\bibitem{146} \textit{Id.}
\bibitem{148} \textit{Id.} at 1072.
\bibitem{149} \textit{Id.} at 1055–56.
\bibitem{150} \textit{Id.} at 1055.
\end{thebibliography}
produced "an eclectic mix of Bachelors over the years," though it has never once included a person of color.151

When Mr. Johnson walked into the hotel lobby where the audition was taking place, a white employee of the defendant's immediately stopped him and asked why he was there.152 When he responded that he was there to apply for The Bachelor, the white employee offered to take his application materials and pass them on to the show's casting directors.153 Mr. Johnson noticed that several white applicants passed by him, but the defendants' employees did not stop the white applicants at all from proceeding to the audition.154 Under the Unruh Act, Mr. Johnson may have a better case because he was actually denied access to the location where the audition was taking place. In the next section, this note will analyze the First Amendment problem and other potential challenges. It will also argue that the current First Amendment jurisprudence is inadequate to address discriminatory casting.

B. Potential Challenges to Discrimination Claims

1. The First Amendment as an Affirmative Defense to All Types of Claims

The First Amendment provides the most robust defense to discrimination claims against creative art by protecting freedom of artistic expression, which includes artistic expression in entertainment, television programs, and dramatic works.155 In Claybrooks, the court addressed whether casting decisions are artistic expression, and held they are "part and parcel of the creative process behind a television program."156 Thus, applying legislation—for example, section 1981—to regulate casting decisions is subject to strict judicial scrutiny because it would essentially regulate "speech based on its content, i.e., the race(s) of the Show's respective cast members."157

The court compared the case to a Supreme Court case, in which a Massachusetts public accommodation statute prohibited parade organizers from discriminating against an activist group based on its members' sexual orientation.158 Because the statute had been "applied in a peculiar way" to control "the expressive content of their parade," the court concluded that it

152. Claybrooks Complaint, supra note 1, at 11.
153. Id.
154. Id.
would impermissibly abridge the parade organizers' free speech rights. The Claybrooks court relied on the Hurley court's conclusion that "a speaker has the autonomy to choose the content of his own message," including whom to choose as participants, and "that choice is presumed to lie beyond the government's power to control." The court further concluded that the same principle applied to section 1981 claims, and to "casting decisions for at least some types of television programs, but not all." The court did not specify to what extent that principle would not apply.

The court recognized that the plaintiffs' goals were "laudable" in seeking "to support the social acceptance of interracial relationships, to eradicate outdated racial taboos, and to encourage television networks not to perpetuate outdated racial stereotypes." Nevertheless, the court stated that the First Amendment would prevent the plaintiffs from pursuing these goals "by forcing the defendants to employ race-neutral criteria in their casting decisions in order to 'showcase' a more progressive message."

Notably, the court rejected the plaintiffs' argument that The Bachelor and The Bachelorette are content-neutral, "identity-themed programming," and that the First Amendment did not apply to such reality shows. The court instead adopted the producers' position that "applying antidiscrimination laws to casting decisions...would threaten the content of various television programs and television networks...targeting particular demographic groups." Such networks include "the Lifetime Network (targeted to female audiences), the Black Entertainment Channel (targeted to African-Americans), Telemundo (targeted to Latinos), the Jewish Channel, the Christian Broadcast Channel, the Inspiration Network (targeted to Protestants), and LOGO (targeted to gays and lesbians.)." While recognizing that this case presented an unprecedented issue, the court rejected the plaintiffs' position on the ground that they failed to cite any authority for the "purported distinction between 'identity-themed programming' and other forms of television programming."

160. Id. at 995.
161. Id. at 996.
162. Id.
163. Id. at 1000.
164. Id.
166. Id. at 998.
167. Id.
168. Id. at 996, 998.
Perhaps a distinction may be made on the basis that *The Bachelor* and *The Bachelorette* are broadcast on a major network channel—ABC—that targets all types of viewers, rather than on an ethnic, religious, or sexual orientation-based *cable channel* that targets a special group of viewers. For example, ethnic media "tell the stories of vibrant [ethnic minority groups] . . . in languages other than English."\(^{169}\) The nature of reality televisions shows like *The Bachelor* and *The Bachelorette* may have an incidental effect of attracting certain groups of viewers. But major television producers do not advertise such reality shows as targeting special groups of people, nor should major television networks actually target certain minority groups as do Telemundo, LOGO, and other similar networks.

Discriminatory casting in content-neutral, reality-based television shows adversely affects the employment rights of racial minorities, and interferes with efforts to promote diversity in media.\(^ {170}\) As the Supreme Court recognized more than forty years ago, "the Constitution . . . places no value on discrimination."\(^ {171}\) Moreover, Congress has made "discrimination unlawful in certain significant contexts," such as employment.\(^ {172}\) Under *Claybrooks*, however, the First Amendment defense allows television producers to continue to engage in unlawful discrimination.

To overcome a discrimination claim, a defendant-producer must show that "the burden [placed on the producers] must be substantial to warrant First Amendment intervention."\(^ {173}\) For example, where casting a person of certain color or race is significant to the narrative, the burden placed on the producer would be substantial.\(^ {174}\) Nonidentity-themed reality television programs, however, do not share the same concern. In this respect, courts should put more emphasis on employment rights, and begin applying Title VII to employment relationships and section 1981 to contractual

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\(^{172}\) Norwood, 413 U.S. at 470 (citing Title VII as an example of “significant contexts”).

\(^{173}\) Robinson, supra note 24, at 65.

\(^{174}\) See id. at 65–67 (arguing that breakdowns for movies violate Title VII because they intentionally discriminate people of color, and that courts should allow First Amendment defense only where there is a strong showing that racial discrimination is necessary to deliver the narrative accurately).
relationship. To achieve this result, litigants should first frame their issues accordingly, especially where their working conditions strongly point to an employment relationship. The courts should then assess discrimination claims by placing fundamental employment rights on an equal footing as the First Amendment, by recognizing congressional intent to eradicate intentional discrimination in American workplace.

2. The Bona Fide Occupation Qualification Exception to Title VII Claims

Another potential defense to a Title VII claim is a Bona Fide Occupational Qualification or “BFOQ” defense, which exempts an employer from liability if the employer hires workers qualified on the basis of religion, sex, or national origin. For reality television producers, a BFOQ defense may initially appear to be the most attractive argument for avoiding Title VII liability altogether because they could argue that viewers prefer to see contestants who resemble ancestors of certain national origin, such as Irish or English. But demonstrating a BFOQ defense is a heavy burden for a defendant to meet, because courts have held that customer preference is not a valid BFOQ unless the defendant satisfies the following two prongs of the inquiry: (1) the preference is the “essence of the business” and (2) the preference must be related to the applicant’s ability to perform the job. The first prong evaluates whether the preferred characteristic is “so essential to job performance that a member of [another group] simply could not do the same job.” The second prong looks to whether the preference is “so important to the operation of the business that

175. See generally id. (applying Title VII to movie casting); see also Basham, supra note 59 (applying Title VII to movie casting and proposing particular solutions tailored to Native American).
176. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (construing congressional intent in enacting Title VII as “to provide a foundation in the law for the principle of nondiscrimination ... and more importantly, [to] enable individuals to develop as individuals”). For an argument to advance Title VII as compelling governmental interest in eliminating employment discrimination to overcome a First Amendment challenge, see Part IV.A.
177. 42 U.S.C. § 2000e-2(e) (2014). The BFOQ defense applies only to disparate treatment claims, i.e., intentional discrimination, not to disparate impact claims. See Ferrill v. Parker Grp., Inc., 168 F.3d 468, 473 (11th Cir. 1999); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1146 n.14 (3d Cir. 1988). In disparate impact cases, however, the employer-defendant can raise a business necessity defense, which is a counterpart of the BFOQ defense but is not applicable to intentional discrimination claims. See 42 U.S.C. 2000e-2(k)(1)(A)(i); see also In re Pan Am. World Airways, Inc., 905 F.2d 1457, 1460–61 (11th Cir. 1990).
178. See Robinson, supra note 24, at 40 (explaining that Title VII on its face does not provide BFOQ defense for race, but that it includes national origin and that “defendants could try to use this exception to justify racial discrimination in breakdowns).
179. Diaz, 442 F.2d at 388; see also Frank, supra note 59, at 476.
181. Id.
the business would be undermined if employees of the “wrong” [group] were hired.”

Thus, the BFOQ defense, if successful, allows the employer to retain the essential nature of its business while hiring based on an applicant’s religion, sex, or national origin without violating Title VII. Congress recognized that discriminatory hiring was often “morally acceptable, but also made sound economic sense.” The EEOC guidelines also acknowledge that discriminatory casting is sometimes necessary “for the purpose of authenticity or genuineness,” but such a BFOQ argument does not apply to race.

In one of the earlier Title VII cases interpreting the essence of business prong, the Fifth Circuit explained that courts should “apply a business necessity test, not a business convenience test.” The court adopted the EEOC’s interpretation that the BFOQ is an extremely narrow exception to Title VII liabilities, and applies only where BFOQs are “reasonably necessary” to the operation of that ‘particular’ enterprise. Six years later, the United States Supreme Court also adopted the same rationale.

In Diaz v. Pan American World Airways, Inc., the airline employer asserted a BFOQ defense based on its overwhelming customer preference for service by female flight attendants. The court concluded that the airline’s BFOQ defense was invalid because the essence of the airline business was transporting passengers, not providing a more “pleasant environment” and “cosmetic effect.” Similarly, in Wilson v. Southwest Airlines Co., the court rejected Southwest Airline’s BFOQ defense that “females are required . . . to attract [] male customers who prefer female attendants and ticket agents, and to preserve the authenticity and genuineness of Southwest’s unique, female corporate personality.” The court explained that “the sex-linked aspects of the job must predominate

182. Id. (citing Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 n.27 (5th Cir. 1976)).
183. Frank, supra note 59, at 476.
184. Id. at 476 & n.12.
186. Title VII allows employers to post ads indicating their preferences so long as the BFOQ is one of sex, religion or national origin. 42 U.S.C. § 2000e-3(b) (2014). Race-based discrimination may be justified where the role requires a certain race classification. For example, PBS would not hire a white female to play the part of Dr. Martin Luther King in a documentary. See Frank, supra note 59, at 473.
187. Diaz, 442 F.2d at 388.
188. Id. at 387.
190. Diaz. 442 F.2d at 388–89.
191. Id. at 388.
to warrant such a BFOQ, such that hiring employees of the opposite sex prevents the company from performing “the primary function or service it offers.”

Adopting the EEOC’s guidelines, the Wilson court compared the essence of an airline business to that of an actor or actress. The court stated that the primary function of an actor or actress “is to fulfill the audience’s expectation and desire for a particular role, characterized by particular physical or emotional traits.” For example, “being female has been deemed a BFOQ for the position of a Playboy Bunny” because, without female sexuality, the Playboy Club cannot perform the service of “titillate[ing] and entic[ing] male customers.” The court rejected Southwest’s BFOQ on the ground that its customer preference for females was not so strong or established to conclude that hiring male employees would undermine the essence of the business—carrying passengers from one point to another.

In the context of dating competition shows like The Bachelor and The Bachelorette, the only viable defense, even if so remotely, may be national origin. Senators Joseph Clark and Clifford Case, who were the prime supporters of Title VII, explained that a director of a play or movie does not have to demonstrate a BFOQ to hire someone who fits certain physical appearances of a role. For example, a television producer could “cast an actor in the role of a Negro” based on the actor’s “physical appearance,” regardless of whether the person is a Negro. Such circumstances would most likely arise in docudramas featuring people of certain national origin, but not likely in reality shows, especially when the viewers themselves come from diverse backgrounds. Moreover, the skin color of the Bachelor or Bachelorette would make “no appreciable difference to the production.” Indeed, when Congress enacted Title VII, it did not include race or color as a BFOQ presumably because Congress could not conceive of any situation in which race could be a valid qualification for a job.

193. Id. at 301.
194. Id.
195. Id.
196. Id. (citations omitted).
197. Id. at 302–03.
199. Id.
200. See Cynthia Lee, Study Finds TV Shows with Ethnically Diverse Casts, Writers Have Higher Ratings, UCLA NEWSROOM (Oct. 8, 2013), http://newsroom.ucla.edu/releases/study-finds-that-tv-shows-with-248757 (“Racial diversity does make a marked and measurable difference to television’s bottom line, and that “people are watching shows that reflect and relate to their own experiences.”).
201. Frank, supra note 59, at 474.
It is easy to see how a docudrama about the American Civil War would require that persons of certain national origin play certain characters. In that case, accurately depicting the racial divide that in many ways defined the Civil War era is, at least arguably, crucial to the program. But it is perhaps more difficult to see how a reality television producer could make similar or analogous arguments about their show(s). In the context of dating competition or talent search shows, it is difficult to imagine that a person’s national origin would in any way affect his or her ability perform the dating, singing, or dancing roles. Moreover, such a preference simply does not accurately paint the picture of today’s American society. After all, diverse backgrounds reflect the reality of America.202

3. California’s Anti-SLAPP Statute Defense to FEHA and Unruh Act Claims

California’s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute “provides for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”203 The protections under this statute apply to state law claims,204 so it would apply to discrimination claims under both the California Fair Employment and Housing Act (“FEHA”) and the Unruh Civil Rights Act.

In granting a motion to strike under the anti-SLAPP statute, Californian courts engage in a two-step process.205 First, the courts decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from a protected activity (i.e., that the act or acts of which plaintiff complains were taken in furtherance of defendant’s right of petition or free speech).206 If the defendant has made such a showing, the court then determines whether the plaintiff has demonstrated a “probability” of prevailing on the claim.207 If, however, the defendant has failed to meet its burden in the first step, the court must deny the motion.208

In Hunter v. CBS Broadcasting, Inc., the plaintiff filed an employment discrimination claim, alleging that CBS Broadcasting refused to hire him as an on-air weather news anchor because of his gender and age in violation

202. Cf. id. (“[W]ith the U.S. population becoming more diverse, ‘this new emerging America will undoubtedly continue to express its diversifying experiences and tastes by making programming choices that resonate more faithfully with them.’”).


206. Id.; see also CAL. CODE CIV. PROC. § 425.16(e).


208. Id.
CBS television stations allegedly replaced him with "younger attractive females," even though "he was 'far more qualified, and far more experienced' to serve as a weather anchor than [the younger attractive females]." In response, CBS filed a special motion to strike under California's anti-SLAPP statute, arguing that the plaintiff's claims arose from CBS' selection of on-air weather reporters and that such conduct was taken in furtherance of the defendant's free speech rights and, therefore, constituted a protected activity. CBS claimed that its local radio operation was one of the largest in the nation, and that the primary reason people watched the local news was to obtain weather information. According to CBS, its "weather anchors were 'local celebrities' who had a significant effect on newscast ratings," and "selecting on-air news personnel, and the weather anchor in particular, was 'one of the most critical decisions in putting together a news team.'" The CBS executive who interviewed the plaintiff did not believe he had the talent, skill or on-air presence to be a weather broadcaster in the Los Angeles market.

In his opposition to CBS' anti-SLAPP motion, the plaintiff argued that "the 'gravemen' of his claims 'was discrimination rather than free speech,'" and that employment discrimination was not a valid exercise of free speech rights. He further contended that "CBS was essentially arg[u]ing that it, along with every other producer of programming, enjoys complete immunity from FEHA liability based on the First Amendment."

The court disagreed, concluding that, in determining the first step of the anti-SLAPP analysis, it evaluates "the core injury-producing conduct upon which the plaintiff's claim is premised," not "the labeling of the claim." Therefore, even if the plaintiff labeled his claim as an employment discrimination claim, the core injury-producing conduct was CBS' broadcasting weather forecast on local television, which is protected by the First Amendment.

For most First Amendment analyses, the inquiry would end once the court determines that the defendant's speech or conduct is protected by the
First Amendment. California’s anti-SLAPP inquiry, however, does not end there. Rather, once the court determines that the plaintiff’s claim arose from the defendant’s protected activity, the court must engage in the second step to determine whether the plaintiff has demonstrated a probability of prevailing on his or her claims. In Hunter, although the court found that the plaintiff’s claim arose from CBS’ protected activity, it remanded the case to the trial court on the second step in the analysis because the trial court had held that CBS’ discrimination did not arise from a protected activity.

Thus, where a court finds that a casting discrimination claim arises from protected activity within the meaning of California’s anti-SLAPP statute, if the plaintiff can demonstrate a probability of prevailing on his or her claim, the case will survive the anti-SLAPP challenge. To achieve that effect in the reality television context, a plaintiff must first establish an employment relationship by applying the common law agency test discussed in supra Part III.A.1. Then the plaintiff should also advance an argument for placing employment rights on an equal footing as the First Amendment right to freedom of expression. To overcome a First Amendment challenge, including the protections under California’s anti-SLAPP statute, the plaintiff should consider an argument for advancing Title VII as compelling governmental interest in eliminating employment discrimination, which this note discusses below.

IV. Proposal: Reducing Discriminatory Casting Practices

A. Title VII as Compelling Governmental Interest in Eliminating Employment Discrimination

To extend the Title VII or FEHA protections to discriminatory casting decisions, litigants and the courts must view them through the lens of equal employment rights. As discussed in Part III.A.1, the working conditions on certain unscripted reality shows strongly point to an employment relationship, rather than an independent contractor relationship. Nevertheless, the lack of precedent on the employee classification question involving the television industry could simply reflect that plaintiffs have not argued their case in terms of equal employment rights. Courts, to be sure, appear unwilling to trump the First Amendment rights with antidiscrimination law due to the creative nature of production decisions in the entertainment industry. Absent a “compelling government interest,” the

219. Id. at 1519.
220. Id. at 1527–28.
221. See infra Part IV.A.
222. See supra Part II.C.
First Amendment’s primacy appears unlikely to change. What follows is a potential argument that reality television applicant could make in favor of finding a compelling government interest.

In cases where Title VII rights clash with the First Amendment free exercise rights, the Ninth Circuit has held that “Title VII establishes compelling governmental interest in eliminating employment discrimination,” and protection of employees from discrimination is “essential to accomplish the purpose of Title VII.”

In the religious context, Congress created a ministerial exception to Title VII because “the Free Exercise and Establishment Clauses of the First Amendment require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers from constitutionally impermissible interference by the government.”

Like regulations restricting free speech rights, regulations restricting free exercise rights must demonstrate “the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief.”

In *EEOC v. Pacific Press Publication Association*, the Press challenged the EEOC’s Title VII enforcement on the grounds that the statute violated the First Amendment “to the extent they reach any Press activities.” The Press also claimed that “Congress lacks authority to legislate with respect to religious institutions because each provision of the Bill of Rights overrides the powers expressly granted to Congress in the Constitution.”

The Ninth Circuit rejected these arguments and concluded that the Press failed to demonstrate that Title VII impermissibly burdened the free exercise of the Press’s religious beliefs.

The court applied a three-step analysis to determine whether Title VII violated the First Amendment: (1) “the magnitude of the statute’s impact upon the exercise of the religious belief”; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and (3) “the extent to which recognition of an

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223. See Claybrooks, 898 F. Supp. 2d at 992–93 (stating that to survive strict scrutiny, a plaintiff must show that: (1) applying a legislation to discriminatory casting advances a compelling governmental interest; and (2) the legislation must be narrowly tailored to serve that interest).

224. EEOC v. Pac. Press Publ’n Ass’n., 676 F.2d 1272, 1281 (9th Cir. 1982); see also Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999) (prohibiting sexual harassment under Title VII because such conduct was “inconsistent with [the church’s] values and beliefs”).

225. Bollard, 196 F.3d at 945.


227. *Id.* at 1278.

228. *Id.*

229. *Id.* at 1279.
exemption from the statute would impede the objectives sought to be advanced by the state." The court stated that prohibiting the church-employer from discriminating against the employee, as required by Title VII, did not infringe the church’s free exercise rights because the church advocated nondiscrimination against women and minority groups. Thus, the court held that enforcing Title VII on the church would place only a minimal burden.

In another case involving a sexual harassment claim against a church, the Ninth Circuit explained that "[s]ome religious interests under the Free Exercise Clause are so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere." There, the court held that "Title VII applies without a constitutionally compelled exception" where the church is not acting within the constitutional bounds. Although these Ninth Circuit cases involve a completely different industry, they at least suggest that the First Amendment is not a complete bar to discrimination claims.

Perhaps future litigants could employ the Ninth Circuit’s rationale in arguing that Title VII applies to discriminatory casting decisions where the producers themselves engage in unlawful discrimination. Such circumstances could arise where producers cast participants to appear on a reality show that requires no predetermined roles. Moreover, one of the producers of *The Bachelor* and *The Bachelorette* publicly denied the accusation of discrimination on the show. The producer blamed the lack of diverse applicants, and in one interview stated: "We always want to cast for ethnic diversity. It’s just that for whatever reason, they don’t come forward. I wish they would." Therefore, the Claybrooks court, like the Ninth Circuit, could have held that applying section 1981 to regulate discriminatory casting amounted to a compelling state interest to protect minorities from arbitrary discrimination. Additionally, enforcing section 1981 would place only a minimal burden on the producers because, according to the foregoing statement, the shows’ producers at least appear to be seeking to diversify the casting pool. Perhaps if the plaintiffs litigated their Title VII claims, the court could have reached this conclusion.

230. *Id.*
231. *Id.*
234. *Id.* at 944.
236. *Id.*
B. Industry Self-Regulation

1. Changes to SAG-AFTRA Membership and EEO Policy

SAG-AFTRA is a union representative to "more than 160,000 media professionals," who are "the faces and voices that entertain and inform America and the world."\(^{237}\) The union "negotiates wages and working conditions in order to maintain minimum standards for its members."\(^{238}\) The union prides itself on its strength in diversity,\(^{239}\) and its "commit[ment] to broad[] employment and involvement" for its members, regardless of race.\(^{240}\) The union has an Equal Employment Opportunity & Diversity Department that monitors discriminatory employment practices, and seeks to increase diversity in its membership.\(^{241}\) The union requires every union-covered television agreement to state the non-discrimination policy—that the "[p]roducer is committed to diverse, inclusive casting."\(^{242}\) As discussed in section II.C., however, first-time reality television applicants cannot benefit from the union’s protection because they do not have the requisite employment in a union-covered position.

Without union representation, reality show applicants are left to bargain with the producers individually. Unchecked, reality television producers—such as the producers of The Bachelor and The Bachelorette—have shown their willingness to use casting practices that are squarely inconsistent with SAG-AFTRA’s goal of preventing discrimination in the industries of which its members are a part. Thus, one way to combat discriminatory casting practices in reality television casting is to allow reality show applicants to receive union protection.

SAG-AFTRA recognizes that the popularity of reality television affects employment rates among its member actors.\(^{243}\) As major networks and producers turn to reality television for more and more revenue, the union may continue to lose membership, thereby diminishing its collective bargaining power. SAG-AFTRA can attempt to minimize discriminatory

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\(^{237}\) Union Information, supra note 50.


\(^{239}\) Union Information, supra note 50.

\(^{240}\) Id.


\(^{243}\) See TV Performers Again Take Hit from Reality Programming, SAG-AFTRA (Oct. 5, 2005), http://www.sagaftra.org/content/tv-performers-again-take-hit-from-reality-programming.
casting practices by offering free membership to first-time reality show applicants for a limited amount of time—for example, three months or six months, or until they obtain a role on a union-covered program, whichever is shorter.244 As a condition to joining under the “free trial” program, the union could require the Union Information trial members to pay certain dues in the future if they are successful. After all, increasing membership is likely in the union’s best interest.

A free membership incentive for applicants could, with enough resulting membership, eventually force producers to register reality programs with SAG-AFTRA and begin hiring members for reality television. And as long as SAG-AFTRA includes reality show applicants as “employees” under its collective bargaining agreements with reality television producers, those employees will be protected under the SAG-AFTRA’s non-discrimination policy.

Alternatively, SAG-AFTRA can negotiate with producers to include a provision that they must register a reality program if they were to hire any member media professionals, including producers themselves, cameramen, extras, makeup artist, photographers, network employees, or the host of the program. Either way, SAG-AFTRA needs to broaden its protections against discrimination to include everyone working in television if it wants to meaningfully carry out its stated goals. Thus, collective bargaining protection may be an avenue for promoting diversity and inclusion in casting decisions.

2. Industry Initiative in Response to Public Opinion

In January 2014, ABC took a cue from the Claybrooks lawsuit and featured the first ethnic Bachelor, Juan Pablo Galavis, in the show’s eighteenth season.245 ABC boasted its first non-white Bachelor in the show’s headlines: “The Bachelor returns with its first Latino,” “[h]ola, Juan Pablo,” “[e]xpect ‘lots of Latino’ fun.”246 But ABC’s efforts were met with criticisms that Galavis “looks so white he could easily slip into a Mitt Romney family photo,”247 and that ABC should “[g]ive the viewers a
difference they can see."\textsuperscript{248} Despite ABC's showcasing, Galavis perhaps only confirmed the producers' reluctance to cast a person of color for the lead role.\textsuperscript{249}

Similarly, as soon as HBO's new series \textit{Girls} premiered in April 2012, its viewers criticized the show for the lack of racial diversity in the cast.\textsuperscript{250} Critics questioned how the four white female friends on the show could only have white friends, and "chastised Hollywood for perpetuating the fiction of such extreme levels of racial separation in personal and romantic relationships."\textsuperscript{251} The show's creator, writer and lead actress, Lena Dunham, promised to change the show's racial makeup if the show were renewed for a second season.\textsuperscript{252} And, as promised, the second season featured African-American actor Donald Glover.\textsuperscript{253} This type of real change, even if it only added one person of color to every television program, has to occur.

Thus, although it may not be pleasant to admit, perhaps the first step in promoting diversity and inclusion in casting decisions can and should come from viewers. As \textit{Girls} example demonstrates, viewers can effectively promote diverse casting by shaping public dialogue. This sort of industry "self-regulation" methodology would also avoid costly litigation.

\section*{V. Conclusion}

Although reality television has gained significant popularity in recent years, legal scholars have not paid enough attention to protect equal employment rights in the reality television industry. Given the highly selective nature of the industry's casting practices, finding the discriminatory motive is extremely difficult. Additionally, the lack of precedent challenging a discriminatory casting decision makes it even more difficult for individuals who have suffered discrimination to bring claims against producers. With the increasing popularity of reality shows and almost no legal protections afforded to ordinary people working on the shows, it is imperative that the law looks critically to discriminatory casting decisions. More importantly, the law of a multicultural society cannot turn a blind eye on racial segregation that denies minorities equal opportunities and equal rights in the entertainment industry.

\begin{thebibliography}{99}
\bibitem{248} Rodriguez, \textit{supra} note 245.
\bibitem{249} \textit{See} Schuster, \textit{supra} note 247.
\bibitem{250} Noliwe M. Rooks, \textit{Why Do We Care More About Diversity on TV Than In Our Schools?}, TIME (May 24, 2012), \textit{available at} http://ideas.time.com/2012/05/24/why-do-we-care-more-about-diversity-on-tv-than-in-our-schools/.
\bibitem{251} \textit{Id}.
\bibitem{252} \textit{Id}.
\bibitem{253} \textit{Id}.
\end{thebibliography}
While federal and state antidiscrimination laws are supposed to provide redress to minorities who have been wrongfully denied employment, no case law clearly supports minorities working on reality television. Moreover, interest in protecting free speech rights trump any interest in promoting diversity. People who have been wrongfully denied employment also do not likely know that Title VII, 42 U.S.C. § 1981 or state civil rights statutes may provide redress. To the extent that the Title VII approach does not adequately address the reality television industry’s constitutional concerns, perhaps the producers should self-impose non-legal solutions to protect equal employment rights that are as important as the industry’s free speech rights.
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